Criminal Rules Advisory Committee
Minutes from Meeting of September 5, 2008

Present: Justice Roger Burdick, Chair; Judge Penny Friedlander, Judge James Cawthon, Judge Theresa Gardunia, Judge Rich Bevan, Ann Marie Kelso, Ken Jorgensen, JaNiece Price, Amil Myshin, Roger Bourne, Sara Thomas, Grant Loebs, Rob Chastain, Bryce Powell, Kelly Mallard, Chuck Peterson, and Cathy Derden.

Probation Violations and Agent's Warrants. For this issue, Kevin Kempf, Chief of the Division of Community Corrections from the IDOC, was present. The Committee had received several requests from district judges and one from the Administrative District Judges to develop a rule specifically addressing probation violation procedures. While defendants on probation are frequently arrested on agent's warrants and may be brought before a magistrate within the appropriate time frame, there is no clear procedure statewide as to what happens next. The agent's warrants may be replaced by the prosecutor's motion to revoke probation supported by a report of violation and sometimes there is a new bench warrant signed by the district judge setting bond. Some magistrates do not feel comfortable setting bond on the district judge's case and others question why a new bench warrant is being issued by the district judge if the defendant has already been arrested and bonded before a magistrate judge. There were also questions as to how these cases are handled when the defendant is arrested in one county and his probation is from another county. It was noted that in some counties the magistrates are not setting bond although by Criminal Rule 5 they should be doing so.

Another question discussed was whether the magistrate needed to make a probable cause finding and whether the agent's affidavit was enough to do so. Sara Thomas believed a finding was necessary based on United States Supreme Court case law. Some members stated that in their counties the magistrate was not making an actual finding of probable cause, but believed this could be done on the basis of the affidavit and agent's warrant. IDOC policy is vague on whether the affidavit of the probation officer is attached to the warrant. There was discussion about what information the courts would like to see in the affidavits and a possible form for this to be used by the probation officers that included the offense, the date the person was placed on probation and for how long, the term violated and how it was violated. It was also noted that protocol should include copying the district judge who sentenced the defendant. Kevin Kempf stated he would work on a first draft of such a form.

A subcommittee was appointed to further study this issue and make a recommendation. The subcommittee will look at the problem of double bonds, the initial appearance, and the finding of probable cause and attempt to come up with a standardized approach to these warrants. Another issue considered will be whether the attorney who represented the defendant is being notified the defendant was arrested on an agent's warrant, assuming the attorney is still of record. The subcommittee will also help develop a form for the agent's affidavit.

The subcommittee members are Judge Rich Bevan, Sara Thomas, Chuck Peterson, Anne Marie Kelso and Justice Burdick.

Rule 29. An issue was raised as to whether the granting of a motion to acquit on the charged offense allows the case to proceed on lesser included offenses. The defense attorneys on the Committee stated the courts always proceed on the lesser included and no one perceived this had been a problem. However, the proposal had been to consider adopting the federal rule, which makes this procedure clearer. I.C.R. 29 tracks the language of the old Federal Rule of Criminal Procedure 29, stating that the court must enter a judgment of acquittal when the offense is insufficient to sustain a conviction for "one or more offenses charged in the indictment, information or complaint." The federal rule now states, "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction."

Even though no problem was perceived, the Committee was of a consensus that the rule should be updated to reflect how it is being applied. The Committee voted in favor of adding the following sentence to Rule 29. "In the event the court dismisses the charged offense, the court must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense."

Time Standards. The Administrative Conference asked the Committee to review the time standards for felonies in the magistrate division. The time standard is currently to have a bind over order within 30 days from the first appearance. Both prosecutors and defense counsel thought this was not enough time as the parties often want to wait until discovery is completed before a preliminary hearing and are often waiting for lab reports. A large percentage of cases are continued but if the defense wants more time to prepare and the state agrees then the time standards should not be interfering with what the parties need. While the Committee was unsure that enlarging the time standard to 45 days would necessarily cut down on continuances, a review of court statistics revealed that as of May 31, 2008, 43% of cases were exceeding this time standard of 30 days for preliminary hearing. The Committee voted unanimously to recommend extending this time standard to 45 days.

Preliminary Hearings. The discussion on time standards tied with another issue raised as to preliminary hearings. The Committee received a proposal asking that consideration be given to either eliminating preliminary hearings or changing the timelines. The reasons set forth for eliminating them was that at its simplest a preliminary hearing is a determination of probable cause and this has already been done by the magistrate at the application for the warrant or at the time of setting bond at the first appearance. It was questioned whether such hearings were an efficient use of judicial resources. It was also questioned whether they were necessary to protect the rights of defendants, noting a defendant has the right to challenge the magistrate's finding of probable cause by filing a motion to dismiss or suppress.

The Committee members were all in favor of keeping the procedure of having a preliminary hearing, noting they settle cases. Sometimes the state sees the evidence is not that strong and the case gets dismissed and sometimes a reluctant defendant sees the evidence and decides to plead. All agreed this hearing was a necessary settlement tool as it forces the sides to sit down and talk. In some counties it may also be the first time the defendant actually gets to speak what the public defender. Even if it is continued to wait for certain evidence, that evidence is often what will compel one party to settle.

There was also no support for changing the timelines. Currently the timelines are 14 days after first appearance for those in custody and 21 days for those who are not in custody. Adding 7 days and making it 21 and 28 was not thought to be particularly helpful. If the defendant is in custody and a continuance is requested that is a different situation than extending the time in jail for a week based on a rule. Either the defendant has filed the request making it voluntary or if the state files the request for continuance the defendant may be able to use that motion to get a reduction in bond.

Personal information in court records. Each committee is being asked to review the rules as to access to personal information and what, if any, steps can be taken to safeguard such information. The committee noted Federal Criminal Rule 49.1 on the topic and decided to appoint a subcommittee to look at whether there should be a criminal rule governing how criminal files are handled. The subcommittee was also asked to look at the possibility of having a cover sheet with personal information for the parties that was sealed to the public. Ken Jorgensen, Roger Bourne and Amil Myshin are on the subcommittee.

Rule 16. The Committee received a letter regarding the meaning of Rule 16(c)(3), which provides "upon written request of the prosecuting attorney, the defendant shall furnish the state a list of names and addresses of witnesses the defendant intends to call at trial." The question was whether the rule requires the defense to disclose impeachment witnesses that the defense knows ahead of time will be called to impeach testimony of the state's witnesses. The state is not required to disclose rebuttal witnesses and an argument had been made that this is a similar situation. The question was posed by a judge who had ruled failure to disclose impeachment witnesses was a violation of the rule and as a sanction the witnesses were not allowed to testify. The defendant was found not guilty in that case so it was not appealed. It was questioned whether this issue should be clearly defined in the rule.

The Committee noted that the rule requires the defense to disclose every witness it intends to call. Rebuttal is really a concept that only applies to the person who has the burden of proof and should be witnesses the state did not know about prior to trial. Disclosure of defense witnesses seems to vary in different counties and may depend upon how well the prosecutors and public defenders work together. Most thought it was not a problem and did not want a rule on it. There was a consensus that no action be taken.

Housekeeping Amendments. Two amendments were approved as follows:

Rule 33 (d)

(2) A requirement that the defendant pay a specific sum of money to the court for the prosecution of the criminal proceedings against the defendant, or a sum of money not to exceed the fine and court costs which could otherwise be assessed if the sentence were not suspended or withheld, which funds shall be distributed in the manner provided for the distribution of fines and forfeitures under section ~~19-4507~~, 19-4705 Idaho Code.

Rule 11. Pleas

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(f) Plea agreement procedure.

The court may participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision ~~(d)~~ (f) (1)(A), (C) or (D), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision ~~(d)~~ (f) (1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

The Committee adjourned and will be waiting to receive reports from the subcommittees.